settlement of the defendants' creditors. With due respect to the learned Mgistrate, when she awarded "ganti rugi" in her judgment, I am afraid she got herself a bit confused as to the nature of the claim, that any award she was to give must be based on a breach of agreement, if any, and that was what she had to consider here in this case.

I confirm that as at page 35 of the Appeal Record there is an admission by the plaintiff that his debt to the defendants is greater than his claim. I find merit in the submission of Mr. Kayveas for the defendants that if the appellants had wanted to bring that as an issue it should have been made the subject of a counterclaim.

I find the first ground of appeal is the only substantial issue raised by the appellants and since my decision is that it had merit, I therefore allow this appeal with costs here and also, since my decision is not to give an order for a retrial as I hold that would be undue hardship on the defendants, I also hereby give cost to the defendants in the Court below.

**TAN KIM SENG**

**v.**

**TAN KIM SAN**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[ORIGINATING SUMMONS NO. D5- 24-65-94]
8 JULY 1994

***PRACTICE & PROCEDURE: Application by respondent to set aside injunction order granted ex parte to restrain respondent from voting at EGM - Applicant's affidavit in reply served a day before hearing contrary to O. 32 r. 13(2) RHC - Whether affidavit should be disregarded - Contention that injunction did not affect outcome of voting - Whether respondent entitled to vote - Whether injunction ought to have been granted - Whether damages should be awarded - Dispute on question of trust - Originating summons filed by applicant - Whether writ more appropriate.***

***COMPANY LAW: Respondent holding voting rights of shares on trust - EGM to be held - Respondent not in favour of resolution to be voted on - Applicant obtaining injunction to restrain respondent from voting at meeting - Whether injunction prohibited by O. 29 r. (2C) RHC.***

***INJUNCTION: Injunction granted able to be set aside "by further order" - Whether injunction perpetual or interlocutory - Consideration of O. 29 r. (2B) RHC.***

This was an application by the respondent to set aside an order of injunction obtained by the applicant on 26 March 1994 to restrain the respondent from exercising his voting rights attached to shares in Tan Cheong Leong & Sons Realty Sdn. Bhd. (the company), which the respondent held in trust for Tan Kim Kow, as the applicant was not in favour of a resolution to be passed at a scheduled extraordinary general meeting (EGM). The respondent also prayed for damages sustained by him as a result of that order.

The learned Counsel for the respondent objected to the applicant's affidavit in reply which was served on him a day before the date of the hearing contending that the affidavit should be disregarded. In his affidavit the applicant had stated that the Court order did not actually affect the outcome of the voting at the EGM because the resolution was voted down by a majority and as the shares held in trust only

formed 7.7% of the total shares, the resolution would not have been carried even if the respondent had voted and thus no damage had been caused to necessitate the setting aside of the order of injunction. The applicant had also filed an originating summons against the respondent, Tan Kim Choo and Hongkong & Shanghai Banking Corporation (M) Trustee Limited (HSBCTL) for an order that HSBCTL hold the shares in trust.

The main objections of learned Counsel for the respondent were that the injunction had been obtained *ex parte*, there was no cause of action, there was no other relief sought in the originating summons, what right to be enforced was unknown, the injunction was perpetual, the shares in question were registered in the names of four persons including the two parties with the respondent exercising the voting rights without any complaints from the joint shareholders, the respondent was denying that the shares were held in trust and that the issue of trust was a question of fact which could not be decided by originating summons.

**Held:**

**[1]** Learned Counsel for the applicant had explained that there were four pending cases in the High Court pertaining to the same company at the relevant time and her firm's employee had made a slip-up as regards the service of the affidavit on the respondent. In the circumstances, the Court allowed the affidavit to be admitted.

**[2]** The grouse of the applicant, in applying for the injunction, was that the respondent could not exercise his voting rights in the absence of a unanimous decision by the joint holders of the said shares allowing him to do so. To the Court, this ran counter to Article 74 of the memorandum and articles of association, which was not disputed by the parties, that "In the case of joint holders the vote of the senior who tenders a vote whether in person or by proxy shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register." It was also not disputed that the respondent's name appeared first in the register and he was therefore entilted to vote to the exclusion of the other joint holders. On this ground alone, it was the Court's opinion that the order should be set aside.

**[3]** As the issue was one of construction of a document and there was likely to be a substantial dispute of fact on the question of trust, it would certainly have been more appropriate for the proceedings to be begun by writ than by originating summons.

**[4]** The fact that the injunction given could be set aside "by further order" meant that the injunction was not perpetual but interlocutory and as such, in the absence of any application to revoke it or to set it aside, would have lapsed two weeks later by virtue of O. 29 r. (2B) of the Rules of the High Court 1980 (RHC) although no return date had been given by the Court. In this regard, this application was therefore unnecessary.

**[5]** Assuming the Court was wrong on the first two grounds, it was the Court's opinion that this was an injunction to stop a particular shareholder from exercising his voting rights which could come under the prohibition specified in O. 29 r. (2C) RHC which states that, "Notwithstanding paragraph (2) of this rule, a Judge shall not grant an injunction on an *ex parte* application if the effect is to stop the holding or progress of a meeting of a body corporate, a society, an association, a union, an organisation, a club or a body of persons whatsoever named." Although the order did not actually stop the holding of the EGM, the fact that the respondent despite being present at the meeting was restrained from exercising his voting rights had the effect of stopping the progress of the EGM as; if he had been able to exercise his voting rights, the decision on the voting of the resolution could well have been different. The fact that it would not have been so even without the order, as alleged by the applicant after obtaining the order, was not the issue. The above stated provision in the RHC made it more than clear that the order should not have been granted. Therefore the Court found that the injunction had been wrongly given and ought to be set aside with costs with damages to be assessed by the Senior Assistant Registrar.

*[Respondent's application allowed with costs, damages to be assessed].*

**Cases referred to:**

*Re Court Hill Canteen; Government Of Malaysia v. Wan Esah [1972] 2 MLJ 257* ***(cit)***

*Siporex Trade S. A. v. Comdel Commodities Ltd. [1986] LLR. Vol. 2, 428* ***(cit)***

*Luke v. South Kensington Hotel Company [1879] Ch. D. Vol. X 121* ***(dist)***
*Foo Yin Shang & Anor. v. Foo Yin Fong & Ors. [1960] 26 MLJ 63* ***(dist)***

**Legislation referred to:**
Rules of the High Court 1980, O. 29 rr. (2B), (2C), O. 32 r. 13(2)

**Other sources referred to:**
**Nelson's Law of Injunctions**, 3rd Edn., pp. 9 & 10

*For the applicant - L. S. Ng; M/s. Sothi & Ang*
*For the respondent - Joseph Yeo; M/s. R. R. Sethu*

**JUDGMENT**

**Haji Abdul Malek Bin Haji Ahmad J:**
By originating summons applied for *ex parte* upon a certificate of urgency on the 24 March 1994, the applicant had asked for an order restraining the respondent either on his own behalf or through his agents or servants from voting on the rights attached to the 885,021 shares in Tan Cheong Leong & Sons Realty Sdn. Bhd. (hereinafter "the company") held in trust for Tan Kim Kow until further order, for costs to be paid by the respondent and for other consequential relief. The order was granted on the 26 March 1994 with an undertaking for damages. The reason for this urgent application was that the extraordinary general meeting for the company had been scheduled for the 28 March 1994 and the applicant was not in favour of the resolution that was to be discussed and voted on at that meeting.

By summons in chambers filed upon a certificate of urgency on the 11 April 1994, the respondent had applied for the order made on the 26 March 1994 to be struck out, for damages sustained by him as a result of that order to be assessed by the Senior Assistant Registrar, for such other order or direction thought fit by the Court, and for costs.

At the outset, learned Counsel for the respondent had objected to the affidavit filed by the applicant on the 1 June 1994 which was in reply to the respondent's affidavit filed on the 14 April 1994, but which was served on him only the day before the hearing in non-compliance with O. 32 r. 13(2) of the Rules of the High Court 1980 (hereinafter "the rules") in consequence of which he said the affidavit should be disregarded. Learned Counsel for the applicant had explained that there were four pending cases in the High Court pertaining to the same company at the relevant time and her firm's employee had made a slip-up as regards the service of the affidavit on the respondent. Using my discretion in the matter, I had allowed the said affidavit to be admitted in these circumstances.

The main objections of learned Counsel for the respondent were that:

(a) the applicant had obtained the injunction *ex parte*;
(b) there was no cause of action;
(c) there was no other relief sought in the originating summons;
(d) what right to be enforced was not known;
(e) the injunction was perpetual;
(f) the shares in question were registered in the joint names of four persons including the two parties the other two being Tan Kim Hai, who had since passed away, and Tan Kim Choo, and all this while, the respondent had been exercising the voting rights in respect of the said shares without there being any complaints from the joint holders;
(g) the respondent was denying the fact that the shares were held in trust as alleged by the applicant; and
(h) the question of trust raised by the applicant was a question of fact which could not be decided by way of originating summons.

Learned Counsel for the applicant had replied that the injunction was applied for on the basis of urgency as the respondent was threatening to act in a certain manner and that the applicant had subsequently filed an originating summons on the 21 April 1994 against the respondent, Tan Kim Choo and Hongkong & Shanghai Banking Corporation (M) Trustee Limited (hereinafter "HSBCTL") *vide* Kuala Lumpur High Court originating summons D4-24-89-94 for an order that HSBCTL hold the said shares in trust.

It is pertinent to note that the applicant, in his last affidavit which had been objected to earlier by learned Counsel for the respondent, had stated that the Court order made on the 26 March 1994 did not actually affect the outcome of the voting at the extraordinary general meeting two days later because the resolution as regards which the applicant was so worried about was in fact voted down by a majority of 67.81 per cent. As the shares held in trust for Tan Kim Kow only formed 7.7 percent of the total 10,590,458 shares the resolution, he added,

would still not have been carried even if the respondent had been able to vote. The grouse of the applicant, in applying for the injunction, was that the respondent could not exercise his voting rights in the absence of a unanimous decision by the other joint holders of the said shares allowing him to do so.

To my mind, this runs counter to Article 74 of the memorandum and articles of association, which was not disputed by both parties, that "In the case of joint holders the vote of the senior who tenders a vote whether in person or by proxy shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register.". It is also not disputed that the respondent's name appears first in the register and he was therefore entitled to vote to the exclusion of the other joint holders. On this ground alone, it was my considered opinion that the order should be set aside.

Learned Counsel for the applicant had reiterated that the order complained of did not affect the outcome of the voting and as such no damage had been caused to necessitate the setting aside of the order. However, I was of the view that this is not the issue and the question is whether the order should have been granted in the first place. Learned Counsel for the applicant had also submitted that they had filed another originating summons to determine the dispute but in my opinion this does not actually change things as since the sole or principal question at issue is one of the construction of a document and there is likely to be a substantial dispute of fact on the question of trust, it would certainly have been more appropriate for the proceedings to be begun by writ than by originating summons. As for the alleged question of trust, the cases of *Luke v. South Kensington Hotel Company* [1879] Ch. D. Vol. X 121 and *Foo Yin Shang & Anor. v. Foo Yin Fong & Ors.* [1960] 26 MLJ 63 have to be distinguished as, unlike the facts in those authorities, here the question of trust is disputed and there should really be a hearing on the matter.

Learned Counsel for the respondent had ardently argued that this was a perpetual injunction which necessitated the filing of a cause of action especially in relation to the issue of trust. He had cited *Re Court Hill Canteen; Government of Malaysia v. Wan Esah* [1972] 2 MLJ 257 as a case on point. I find it quite necessary at this juncture to refer to **Nelson's Law of Injunctions** 3rd Edn., at pages 9 and 10 which states:

> A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant. An interlocutory (or interim) injunction, on the other hand, is granted before the trial of an action; its object is to keep matters in *status quo* until the question at issue between the parties can be determined. Accordingly, the plaintiff may obtain it without making out a case which will necessarily entitle him to a perpetual injunction. A perpetual injunction is so called because it is granted at the final determination of the parties' rights and not because it will necessarily operate for ever. For instance, a perpetual injunction may be granted so as to continue only during the currency of a lease.
>
> A perpetual injunction is granted after a judicial decision, when the plaintiff has established the existence of his right in law and the fact that the defendant has infringed it or is about to do so. An interlocutory injunction, on the other hand, is one which follows as quickly as possible upon the issue of the writ, directing the defendant to do or refrain from doing something until the trial of the action. Such an order may involve the defendant in considerable financial loss, and it is therefore granted only after the plaintiff has given an undertaking to indemnify the defendant to do or refrain from doing something until the trial of the action.
>
> An interlocutory injunction may be prohibitory to maintain the *status quo* by restraining a threatened act, or to stop the act complained of being continued, or it may be mandatory. All interlocutory orders made in the course of a proceeding in the nature of a suit must necessarily lapse with the decision of the suit itself, unless, of course, the suit is one for permanent injunction, and the interim injunction is made permanent as a part of the decretal order made by the Court.
>
> Mandatory injunctions must of necessity be perpetual, but restrictive injunctions may be perpetual, interlocutory, or *ex parte*. "Perpetual" does not mean necessarily that the effect of the order must endure for ever, for the plaintiff may require it only for a time; for instance, if an employee, on entering his employer's service, covenants not to set up a business in the same town within three years of quitting that service and the Court thinks the covenant can be upheld as reasonable, its injunction against breach will be continued to the stipulated period. The real meaning of the phrase is that the order is meant finally to settle the mutual relations of the parties, being

> made as the result of an ordinary action, tried in due time and in the ordinary course of events, at which the Court has heard in the ordinary way the arguments on both sides. But a plaintiff may not always be able to wait for the action to come on in the normal course; he may feel that irreparable damage will be done to him if the defendant be not prevented at once from doing the act which he finds objectionable. If such is the case, he will, simultaneously with or just subsequently to the service of the writ of summons on the defendant, serve on him also a notice that on the next motion day his Counsel will apply to the Court for an injunction. The service of the notice will enable the defendant's Counsel also to be heard, if he wishes, but neither side will be heard fully, and the Judge will be able to form only a general impression, not a decided opinion, as to the merits of the case. If the plaintiff's affidavit has made out what the Judge thinks a sufficient case, he will grant an injunction, which cannot be final, because it is not mean(t) to settle the position of the parties.

My understanding of this excerpt and the fact that the injunction given can be set aside "by further order" means that the injunction given is not perpetual but interlocutory and as such, in the absence of any application to revoke it or set it aside, would have lapsed two weeks later on the 9 April 1994 by virtue of O. 29 r. (2B) of the rules although no return date had been given by the Court. In this regard, this application is therefore quite unnecessary.

Even if my finding is held to be in error, it is also my considered opinion that this was an injunction to stop a particular shareholder from exercising his voting rights and could well come under the prohibition specified in O. 29 r. (2C) of the rules which states that "Notwithstanding paragraph (2) of this rule, a Judge shall not grant an injunction on an *ex-parte* application if the effect is to stop the holding or progress of a meeting of a body corporate, a society, an association, a union, an organisation, a club or a body of persons whatsoever named." Although the order does not actually stop the holding of the extraordinary general meeting scheduled on the 28 March 1994, in my view, the fact that the respondent despite being present at the meeting was restrained from exercising his voting rights had the effect of stopping the progress of the extraordinary general meeting as if he had been able to exercise his voting rights, the decision on the voting of the resolution could well have been different. The fact that it would not be so even without the order, as alleged by the applicant after obtaining the order, is not the issue. The above stated provision in the rules has made it more than clear that the order should not have been granted.

In these circumstances and on these considerations, it is firstly my view that the order should not have been granted at all in view of the prohibition as regards the stopping of the holding or progress of any meeting in O. 29 r. (2C) of the rules, and secondly, as it is an interim injunction granted *ex parte,* it would have lapsed in any case after two weeks under O. 29 r. (2B) of the rules in the absence of any application to revoke it or set it aside and consequently this application need not have been made. Thirdly, assuming I am held to be wrong on the first two grounds, in the light of Article 74 of the memorandum and articles of association, it is my finding that the injunction had been wrongly given and ought to be set aside with costs which I so ordered. I had also directed the Senior Assistant Registrar to ascertain the damages sustained by the respondent by virtue of the order wrongly granted.